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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.6951 OF 2007

M/s.Repro India Ltd.)
a company incoroporated within)
the meaning of Companies Act,)
1956 and having its office)
at 50/2, TTC, MIDC Industrial)
Area, Mohape, Navi Mumbai) ..Petitioner .

Versus

1.Unionof India through the)
Secretary Ministry of Finance)
Department of Revenue North)
Block, New Delhi-110 001.)
2.Assistant Commissioner of)
Central Excise, Belapur III)
Division, having his office)
at 5th Floor, C.G.O. Complex,)
C.B.D. Belapur, Navi)
Mumbai-400 614)....Respondents

Mr. R. Sridharan with Mr. Prakash Shah i/b. PDS Legal for the petitioner.
Mr. A.S. Rao with Mr. B.M. Chatterji for the respondents.

CORAM : F.I. REBELLO &
R.S. MOHITE, JJ.
DATED : 6TH DECEMBER 2007

JUDGMENT (PER F.I. REBELLO, J.):

. Rule. Heard forthwith.

1. The petitioners are engaged in the manufacture of (1) Packaged software falling under Chapter 85.23 of the First Schedule of the Central Excise Tariff Act, 1985 and liable to duty at 8% since 1st March, 2006; (2) stationery books such as letter pads, etc., falling under Heading 48.20 of the First Schedule to Central Excise Tariff Act, 1985 liable to duty at 16% and (3) printed books and other products of printing industry falling under heading 4901 of the First Schedule to Central Excise Tariff Act, 1985 which are chargeable to nil rate of duty. The printed books are entirely exported by the petitioners.

2. It is the case of the petitioners that they have taken Cenvat credit of the duty paid on the inputs used in the manufacture of aforesaid products namely packaged software, stationery books and printed books. The said credit is utilized for payment of duty on packaged software and stationery books. Refund in cash is claimed for credit which cannot be so utilized, to the extent it is attributable to printed books exported by it.

. The Assistant Commissioner of Central Excise, respondent No.2 has accepted the Letter of Undertaking furnished by the petitioners on 17th August, 2006 vide his letter dated 29th August, 2006 and allowed the petitioners

to clear all the dutiable goods (packaged software) as also excisable goods attracting Nil rate of duties (printed books), to be cleared under the said Form UT-1.

3. Thereafter the Assistant Commissioner of Central Excise, Belapur III Division, respondent No.2 by his letter dated 9th April, 2007 directed the petitioners that they should clear only dutiable goods such as packaged software under the aforesaid bond i.e. UT-1 executed by them. The Assistant Commissioner directed that the petitioners cannot clear exempted goods or goods chargeable to nil rate of duty namely printed books under the above bond which was reiterated by letter dated 16th April, 2007. The respondent No.2 directed that non-dutiable goods namely printed books cannot be cleared under Letter of Undertaking as there is no provision under Rule 19 of the Central Excise Rules, 2002 for such clearance. The respondent No.2 by his letter of 18th May, 2007 directed the petitioners to pay an amount equal to 10% of the sale price of the exempted goods namely printed books exported by it based on Rule 6(3)(b) of the Cenvat Credit Rules, 2004.

. The petitioners are aggrieved by the directions issued by the respondent No.2 by his letter dated 9th April, 2007 and 15th April, 2007. The petitioners also challenge the direction by the respondent to the petitioner to pay 10% of sale price of printed books duly exported without payment of duty based on Rule. 6(3)(b) of Cenvat Credit Rules, 2004.

4. On behalf of the respondents reply was filed by Shri C.K. Sandhu, Assistant Commissioner, Central Excise, Belapur-III Division, Respondent No.2 herein. It is contended that the petitioner was directed to clear only dutiable goods such as packaged software under Bond as clearance of exempted goods for export is governed by a separate procedure prescribed under the Act and the Rules. According to the respondents the provisions of Rule 6(1) of the Cenvat Credit Rules, CENVAT credit is not allowed for the quantity of inputs used in the manufacture of exempted goods except in the circumstances mentioned in Rule 6(2). Considering Rule 6(2) a manufacturer availing CENVAT Credit on the inputs, which is used in dutiable as well as exempted goods, has to maintain a separate account for the same. The credit is allowed only on the quantity of inputs used in the manufacture of dutiable goods. The manufacturer has an option not to maintain separate accounts as envisaged in Rule 6(2) and follow any of the conditions as prescribed under Rule 6(3) (b) by paying an amount equal to 10% of the total price of the exempted final product. Therefore, for the exempted goods cleared for export from their factory, the petitioner is liable to pay an amount equal to 10% of the price of such exempted goods as stipulated under Rule (3)(b) as the said Rule does not distinguish between clearances for home consumption or export clearance but includes all clearances from the factory. As far as printed books are exempted goods/goods chargeable to nil rate of duty, they cannot be allowed to be cleared under the Bond

and the petitioner has to follow the ARE-2 procedure for claiming refund of the duty on the contents of the exempted goods. These directions issued, it is stated, are as per law.

. An additional affidavit was filed by A.K. Prasad working as Commissioner of Central Excise, Belapur pursuant to the directions of this Court. It is set out therein, that in respect of the export bond/Letter of Undertaking is taken under Rule 19 of the Central Excise Rules 2002 to protect the revenue in those cases where export does not take place but diverted for home consumption. The goods which are subject to nil rate of duty in Central Excise Tariff Rules are not required to execute any bond/Letter of Undertaking because there is no revenue implications.

5. The question for consideration is whether in respect of exempted goods for export, the inputs in respect of which are dutiable, can be cleared by giving bond under Rule 19 of the Central Excise Rules, 2002. For the purpose of our discussion some of the relevant Rules of the Central Excise Rules 2002 to be considered, read as under:-

> "19(1) Any excisable goods may be exported without payment of duty from a factory of the producer or manufacturer or the warehouse or any other premises as may be approved by the Commissioner.
>
> 19(2).....

(19)(3). The export under sub-rule (1) or sub-rule (2) shall be subject to the such conditions, safeguards and procedure as may be specified by notification by the Board."

. In terms of the aforesaid Rule 19(1) Notification No.42/2001 has ben issued which inter alia stipulates furnishing of a general bond in prescribed form to the Assistant commissioner having jurisdiction over the factory. Alternatively, the notification also stipulates that the manufacturer exporter may furnish a Letter of Undertaking in a prescribed form in lieu of a bond.

5. The petitioners haveproduced the relevant portion of Letter F.232/20/01-Central Excise dated 8th November, 2001 of Ministry of Finance which has been extracted in Order-in-Original dated 31st March, 2004 by the Commissioner of Central Excise in the case of Lyka Labs Ltd. which reads as under:-

It is deduced that according to CERA since the goods are even otherwise wholly exempted they cannot be exported under rule 13. In this connection the following would indicate that even exempted goods can be exported in accordance with the provisions of Rule 13.

Rule 13 provides that the Central Government may by Notification in Official gazette permit export of

specified goods subject to safeguards, conditions and limitations. In the notification issued under rule 13, the Government has specified all excisable goods to be eligible for export under bond in terms of rule 13. The Notification does not make any distinction between the dutiable and exempted goods nor debars the exempted goods from export under rule 13. Exempted goods are excisable as having been manufactured and covered under schedule to CETA 1985 and as such are eligible to be exported under Rule 13.

As per the Board's Circular No.471/37/99-CX dated 20.7.99, even the manufacturers of goods attracting nil rate of duty or wholly exempted goods can obtain registration under Rule 174 for the purpose of exporting their goods. Obviously, such manufacturer can, after obtaining registration as permitted vide aforesaid circular, export their goods only under bond in terms of Rule 13 and not in terms of Rule 12 as such goods cannot be exported on payment of duty and rebate claimed under Rule 12."

Thus the Ministry of Finance vide letter dated 8th November, 2001 has specifically clarified that even the exempted goods can be cleared for export under bond in terms of Rule 13 of the erstwhile Central Excise Rules, 1944, which is pari materia with Rule 19 of the Central Excise Rules, 2002. The Circulars issued by the Central Government are binding on

the Central Excise Department. The Madras High Court in **Tamil Nadu (Madras State) Handloom Weavers Co-operative Society Ltd. vs. Assistant Collector of Central Excise, Erode, 1978 ELT (J.57)** has expressly held that the goods figuring in the Schedule to Central Excise Tariff Act for which duty specified is Nil are also excisable goods. This view has been approved by the Supreme Court in **Wallace Flour Mills vs. CCE 1989 (4) ELT 598 (S.C.).**

. As such though the printed books attract nil rate of duty under Heading 49.01 of the First Schedule to the Central Excise Tariff Act, 1985 they are indeed excisable goods. If they are to be exported, Rule 19(1) read with Rule 19(3) of the Central Excise Rules, 2002 have to be complied with.

6. As noted earlier the defence of Revenue has been that as the goods otherwise attract nil rate of duty, therefore, no bond or undertaking is required. This overlooks the fact that if the exempted goods are not exported many liabilities are attracted. Firstly, if the assessee has not maintained separate accounts, it will be liable to pay an amount of 10% on the sale price of the goods not exported under Rule 6 (3)(b). Similarly, if it has obtained any adjustment or refund in terms of Rule 5 of the Cenvat Credit Rules, 2004 all of them have to be repaid if the goods are not exported. Therefore, even if no excise duty as such is required to be paid on the final product which attracts Nil rate of duty, other amounts/sums become payable to the Revenue on account

of the failure of the assessee to export. This bond/undertaking is required to be furnished so that the petitioners, undertake to surrender back all the benefits which the assessee has obtained from the Government on the footing that the goods will be exported, but which have not been so exported.

7. We may also consider the provisions of Rule 6 of the Cenvat Credit Rules, 2004. The relevant portion of Rule 6(6)(v) reads as under:-

> "(6) The provisions of sub-rules (1), (2), (3) and (4) shall not be applicable in case the excisable goods removed without payment of duty are either--
>
> (i).....
>
> (ii).....
>
> (iii).....
>
> (iv).....
>
> (v) cleared for export under bond in terms of provisions of the Central Excise Rules, 2002."

. The petitioners had manufactured both dutiable and exempted final product (packaged software and printed books respectively). The petitioner has taken credit on input used in the manufacture of dutiable as well as exempted final products. If the exempted products are exported outside India the provisions of Rule 6(6)(v) of the Cenvat

Credit Rules are applicable. Therefore, the bar provided under Rule 6(1) and the liability created under Rule 6(3)(b) of the Cenvat Credit Rules, 2004 are not attracted. By denying to the petitioner from exporting the printed books under bond what the respondents want to do is in fact to levy 10% on the sale price of the printed books in terms of Rule 6(3)(b) of the Cenvat Credit Rules, 2004. In our opinion this is wholly impermissible.

. The provisions as now contained in Rule 6 of the Cenvat Credit Rules, 2004 were contained in Rule 57C and 57CC of the Central Excise Rules, 1944 as they stood prior to 1st April, 2000. From 1st April, 2000 till 30th June, 2001 similar provisions were contained in Rule 57AD of the Central Excise Rules, 1944. In the context of these Rules circular dated 8th November, 2001 of the Ministry of Finance was issued. It dealt with the question whether 8% has to be paid on the sale price of exempted goods. Under Rule 6(3)(v) of Cenvat Credit Rules, 2994, 8% has been increased to 10%. The relevant portion of the Circular dated 8th November, 2001 reads as under:-

> "Further, it is now clearly and specifically mentioned in Rule 57AD(4) that the provisions relating to non-availability of modvat credit and reversal @ 8% is not applicable in case the exempted goods are cleared for export under bond in terms of the provisions of Rule 13.

In the new rule 57AD, it has been explicitly provided what was implicity in erstwhile rule 57C and 57CC. Further, the present rule 57AD(4) clearly goes on to show that the exempted goods are eligible to be exported under bond. To interpret otherwise will render the new rule 57AD(4) redundant.

In view of the foregoing in this case the provisions of sub-rule 57C(1) are satisfied as stipulated under Rule 57C(2) as well as Rule 57CC(6)l and there was no need to comply with the provisions of rule 57CC1). Therefore, it is clear that an amount of 8% of the price of the goods exported is not required to be paid irrespective of whether the exported goods are exempted or otherwise."

. It would thus appear that the direction of the respondent No.2 to the petitioners to pay 10% even though printed books were exported is not legally sustainable. It is only in the event the petitioners does not export the printed goods and do not maintain the account as contemplated by rule 6(2) the petitioner would be required to pay 10% on the sale price of the printed books not so exported.

. Even though Rule 6(1) of the Cenvat Credit Rules, 2004 provides that no Cenvat credit will be available in respect of the inputs used in the manufacture of exempted products, Rule 6(6)(v) of the Cenvat Credit Rules creates an

exemption inter alia in respect of the excisable goods removed without payment of duty for export under bond in terms of Central Excise Rules, 2002. Considering the language of Rule 6(6)(v) of the Cenvat Credit Rules 2004 the petitioners are entitled to avail Cenvat Credit in respect of the inputs used in the manufacture of the final products being exported irrespective of the fact that the final products are otherwise exempt.

8. The Cenvat credit is allowed nthe duty paid on inputs to mitigate the effect of double taxation of levying duty on inputs as also on the final product. If, however, the exempted final product is exported it calls for a special relaxation/dispensation to make the goods of the country internationally competitive. As an illustration suppose a final product like tractor is otherwise exempted from excise duty even for domestic consumption and such tractors are exported. The various inputs like engines, etc., used in the tractor may have suffered excise duty. The intention is not to export taxes but only to export the goods. If the inputs like engine going into the manufacture of export commodity namely tractors are subject to excise duty, the Indian manufacturer of tractors becomes internationally uncompetitive. This appears to be the object behind the Government enacting special scheme to ensure that the duty is not levied even on inputs going to the export products. Rule 6(6)(v) has been consciously and expressly enacted with the specific objective to ensure that duty is not levied even on inputs going to the export products.

. This method of adjustment, both from the point of Government and the assessee is to allow the assessee to take Cenvat credit on the inputs used in the export products and allow the assessee himself to adjust it for payment of duty on other products. If the adjustment is not possible, Cenvat credit is refunded in cash. This appears to be the Scheme of Rule 5 of the Cenvat Credit Rules, 2004. With a view to achieve this object, the Central Government has specifically enacted Rule 6(6)(v) of the Cenvat Credit Rules, 2004 to the effect that the bar created by Rule 6(1) will not apply for goods exported. Considering the conscious and express provisions contained in Rule 6(6)(v) for exported goods, to deny the permission to export under bond and/or to levy 10% on the value of the exported goods under Rule 6(3)(b) on the footing that the printed books exempt and, therefore, attract Rule 6(1) would be incorrect and completely nullify and frustrate Rule 6(6)(v).

9. We may also consider the various clauses of Rule 6(6) which would indicate that they relate to goods which are wholly exempt from duty. Rule 6(6)(i) relates to supply to SEZ. These are wholly exempted from duty vide Notification dated 19th October, 2001 and notification dated 22nd July, 2003. Rule 6(6)(ii) relates to supply of goods to Exported Oriented Units. These are wholly exempt by Notification dated 31st March, 2003. Rule 6(6)(iii) relates to goods supplied to a unit located in Electronic Hardware Technology Park or Software Technology Park. Such supplies are exempt

from duty by Notification dated 31st March, 2003. Rule 6(6)(iv) relates to supplies to United Nations or an international organisation for their official use. These are exempt by Notification No.108/95. Rule 6(6)(v) relates to export under bond. Rule 6(6)(vi) relates to gold or silver arising during refining of copper. These are exempt from payment of duty by Notification No.5/2006-CE dated 1st March, 2006. It would thus be clear that all the clauses of Rule 6(6) are enacted only to deal with the situation when the final products are exempt from payment of duty. If a final product is not exempted from duty, Rule 6(1) is not attracted at all and hence Rule 6(6) is unnecessary. Rule 6(6) is precisely needed only when the final products are exempt from payment of duty. In this context the Revenue itself has accepted that under the provisions of Cenvat Credit Rules, 2002 there were provisions for removal of exempted goods under bond but the same was not available with effect from 9th September, 2004 under Cenvat Credit Rules, 2004.

. We may reproduce Rule 6(5) of the Cenvat Credit Rules 2002 which reads as follows:-

> "(5) The provisions of sub-rule (1), sub-rule (2) sub-rule (3) and sub-rule (4) shall not be applicable in case the exempted goods are either --
>
> (i) cleared to a unit in a free trade zone; or

(ii) cleared to a unit in a special economic zone;

or

(iii) cleared to a hundred per cent export oriented undertaking; or

(iv) cleared to a unit in an Electronic Hardware Technology Park or Software Technology Park; or

(v) supplied to the United Nations or an international organization for their official use or supplied to projects funded by them, on which exemption of duty is available under notification of the Government of India in the Ministry of Finance (Department of Revenue No.108/95-Central Excise, dated the 28th August, 1995, number GSR 602(E) dated the 28th August, 1995; or

vi) cleared for export under bond in terms of the provisions of the Central Excise Rules, 2002."

We may reproduce Rule 6 (6) of the Cenvat Credit Rules, 2002, which read as under:-

" The provisions of sub-rule (1), (2), (3) and (4) shall not be applicable in case the excisable goods removed without payment of duty are either -

(i) cleared to a unit in a special economic zone; or

(ii) cleared to a hundred per cent export oriented undertaking; or

(iii) cleared to a unit in an Electronic Hardware Technology Park or Software Technology Park; or

(iv) supplied to the United Nations or an international organization for their official use or supplied to projects funded by them, on which exemption of duty is available under notification of the Government of India in the Ministry of Finance (Department of Revenue No.108/95-Central Excise, dated the 28th August, 1995, number G.S.R 602(E) dated the 28th August, 1995; or

(v) cleared for export under the items of the provisions of the Central Excise Rules, 2002; or

(vi) gold or silver falling within Chapter 71 of the said First Schedule, arising in the course of manufacture of copper or zinc by smelting."

A perusal of the aforesaid Rules would clearly show that sub-rule (i) to (vi) are identical and the difference in rule 6(6) of the Cenvat Credit Rules 2004 and Rule 6(5) of the Cenvat Credit Rules, 2002 is not relevant for the purpose of the present case. Rule 6(1), 6(2), 6(3) and 6(4) of the Cenvat Credit Rules under Cenvat Credit Rules, 2002

as well as under the Cenvat Credit Rules 2004 remains the same. As noted earlier the object and purpose of rule 6(6) of Cenvat Credit Rules, 2004 is to promote the policy of the Government that the benefit of duty paid on input is available as credit in respect of certain exempted goods as well as the exempted goods exported under bond. The minor change in the wordings of Rule 6(6) of the Cenvat Credit Rules, 2004 by using the term "excisable goods" instead of exempted goods is that the term ’exempted goods’ may not cover the dutiable goods which are exported under bond. Therefore, in order to widen and cover both dutiable and exempted goods exported under bond, Rule 6(6) of Cenvat Credit Rules, 2004 uses the expression "excisable goods". As am illustration, if a car which is dutiable is exported under bond without payment of duty there may be doubt as to whether credit on the inputs will be available, since the car is cleared without payment of duty under Rule 6(5) of Cenvat Credit Rules, 2002. It could be argued that it covers only the exempted goods exported and not dutiable goods exported. In order to cover such a situation also, Rule 6(6) of Cenvat Credit Rules, 2004 used the expression ’excisable goods’ which is wider to include both dutiable as well as exempted goods.

10. In our opinion therefore, the petition will have to be allowed. The Petitioners are entitled to remove the goods on furnishing the bond as set out in Annexure 16 in Form B-1 of the Central Excise Manual. Rule made absolute accordingly. There shall be no order as to costs.

(R.S.MOHITE, J.) **(F.I. REBELLO, J)**